Supreme Court, U. S.
FILED
OCT 23 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-5754

EVA AGNES KUTAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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October 19, 1976

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IN THE

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No.

EVA AGNES KUTAS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Eva Agnes Kutas, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit, entered on September 27, 1976, which affirmed the judgment of conviction entered by the United States District Court for the

District of Oregon.

OPINION BELOW

The opinion of the Court of Appeals is not officially reported. (See Appendix, infra.)

JURISDICTION

The judgment of the Court of Appeals was entered on September 27, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS PRESENTED

1. Whether joint representation of petitioner Kutas with her two co-defendants by the same attorney constituted a conflict of interest in contravention of her right to the effective assistance of counsel.

2. Whether Kutas intelligently and knowingly waived her right to separate counsel.

3. Should this Court resolve the conflict among the Circuit Courts of Appeal in determining whether an attorney's repre-

sentation of multiple defendants constitutes a conflict of interest and a denial of the effective assistance of counsel?

STATEMENT OF THE CASE

The petitioner, Eva Agnes Kutas, was indicted with other defendants for, inter alia, conspiring to harbor and conceal an escaped Federal prisoner, Carl Cletus Bowles (Ct. 1-5).[1] After a trial by jury, defendant was convicted on the conspiracy charge and also convicted of the substantive offense of harboring and concealing the escaped Federal prisoner.[2] She was sentenced to two years' imprisonment. The facts pertaining to the issues raised in this petition are as follows:

At the trial, petitioner Kutas was

1. References to the District Court Clerk's Transcript of Record will be referred to as "Ct." References to the trial transcript will be designated "R". References to the transcript of hearing on the motion for new trial will be designated as "H.Tr."

2. The evidence of guilt was summarized by the Court of Appeals as follows:

represented by attorney Robert Ackerman, who also represented defendants Ray Eaglin and Sara Maltzman. All three defendants were tried together. Defendant Kutas did not testify on her own behalf, but presented evidence that at the time she allegedly harbored Bowles she was elsewhere.

Defendant Kutas first met with attorney

2.(Cont.) "On May 17, 1974, Carl Bowles, a federal prisoner serving concurrent state and federal sentences at the Oregon State Penitentiary, left the penitentiary under a four-hour pass and failed to return. Coconspirator Joan Coberly hid Bowles for approximately ten days, after which she and Bowles were driven to a house in Eugene, Oregon, where coconspirator Ray Eaglin was persuaded to help Bowles to escape. Kutas was present in the house at the time. Over the next hour or so Kutas and Eaglin loaded gear and supplies into a station wagon. Then Eaglin drove Bowles, Kutas and Coberly to a remote area of the Willamette National Forest where Bowles and Coberly set up camp in an underground bunker some distance into the forest. On the trip from Eugene to the campsite, Kutas prepared a list of things which Bowles would need for a long stay at the campsite. Throughout the trip, Eaglin carried a handgun visible in a side holster, at some point gave Bowles a gun, and, according to Coberly, told Bowles in Kutas' presence: 'I don't think they are going to be looking for you, because everybody is looking for Hearst.'"

Ackerman in September, 1974, when she consulted with him as Ray Eaglin's appointed attorney (H.Tr.98). Ackerman thereafter agreed to represent Eaglin, Kutas and Maltzman, the latter two on a retained basis with Maltzman's family paying the fee. Kutas suggested at that time that another attorney skilled in handling conspiracy cases might be involved in the case. Mr. Ackerman discouraged this approach, indicating that he did not need another attorney because so much of the investigation had been done and also because attorneys find difficulty working with each other if they might differ on defense strategy or on other parts of the trial (H.Tr.72). When a request was made to United States Magistrate Hogan that Ackerman be permitted to represent all three defendants, the Magistrate admitted his misgivings concerning that course of action and waited approximately two months before approving Ackerman's joint representation (H.Tr.171).

At a hearing on February 24, 1975, an affidavit was submitted, signed by each of the three defendants, concerning the issue of conflict of interest.[3] At that time, Magistrate Hogan began questioning each of the defendants concerning the affidavit, but was cut off in his examination of Eaglin, the first defendant, by Ackerman who objected to an inquiry into matters which might involve the attorney-client privilege (Ct.249). As a result, defendant Kutas was simply asked whether the affidavit was the same affidavit which she signed and which had been read that morning, and then whether any pressure or coercion was placed upon her to sign it. She was given an opportunity to respond only to each of those questions (Ct.253). As Magistrate Hogan stated at the hearing on the motion for new trial: "I merely asked summary type questions

3. The affidavit stated that each defendant knew about possible conflicts, had discussed the matter thoroughly with Ackerman, realized that each had a right to separate counsel, and that each saw no factual or legal issues which would give rise to any conflict.

of the defendants * * * defense attorneys * * *know more about the facts in the case than the judge does at that point and I felt that was a matter he could make a better judgment about and I didn't know how I could overrule his decision on that." (H.Tr.174-175). The day of the hearing, February 24, 1975, Assistant United States Attorney Hammersley made an offer of immunity to defendant Kutas. She rejected this offer, based on her feeling that it involved simply her testifying against the other defendants (H.Tr.79). She did not understand that she could be immunized, over her objections to giving testimony, or that she could simply make a statement to the government about her actual knowledge of the case (H.Tr.80).

Apart from a very brief discussion of the affidavit concerning conflict of interest, prior to her signing it, Kutas had only one conversation with attorney Ackerman, in late December, 1974, concerning conflict of interest.

The discussion was quite brief, and Kutas felt the only meaning of a conflict was that if one defendant changed his testimony or testified against the others, Ackerman would have to withdraw. She also understood it to mean factual evidence indicating guilt of any other defendants would also constitute a conflict requiring that Ackerman withdraw (H.Tr.73).

After the trial had begun, a meeting with Ackerman, David Jensen (attorney for co-defendant Gregg Lui Kwan) and the defendants occurred. The two attorneys discussed their decision that none of the four defendants should testify on their own behalf. Kutas, however, was worried about the impression on the jury if she did not testify but was convinced by comments made by Mr. Ackerman that this strategy should be employed (Ct.241-242).

In his closing argument at trial, Ackerman linked the fate of Eaglin to the fate of Kutas, stating that if Joan Coberly was

"lying as to Miss Kutas, she would also be lying about Ray Eaglin, something that we have been able to establish since this case began" (Tr.1008). The government had claimed that Joan Coberly, niece and girlfriend of Carl Bowles, had assisted Bowles in fleeing after his release on a social pass from prison.[3(a)] Eaglin and Coberly, the trial testimony established, drove Bowles from Eugene to a camp in the Willamette National Forest. Kutas had allegedly been a passenger in their vehicle. Coberly had testified that Kutas' involvement had simply been preparation of a "grocery list" of items which might be needed by the others and furnishing some socks to Coberly (R.238,241-44).

Coberly had testified at trial that "I didn't think she [Kutas] was that much involved" (Tr.376).

By contrast, the evidence against Eaglin showed that he transported Bowles and Coberly to a campsite in the Willamette National Forest (R.241-242); that upon arrival

3(a). Joan Coberly was the sole government witness implicating Kutas in the alleged conspiracy.

at the campsite, Bowles, Coberly and Eaglin went to an underground bunker hiding place provided by Eaglin (R.245-247); that Eaglin came back later that day to bring canned goods and other foodstuffs (R.249); that Eaglin returned to the campsite several days later with extra supplies (R.256); that Eaglin, together with Armsbury, again returned to the campsite and transported Coberly and Bowles to a home in Eugene (R.269-270); that Eaglin provided Coberly and Bowles with false I.D. (R.293-294); and that, after secreting Bowles at the home of Mildred Wellborn, Eaglin told Mrs. Wellborn to "keep [her] mouth shut" (R.501).

Following her conviction and sentencing, Kutas (then represented by another attorney) filed a motion for a new trial based on the ground that Ackerman's joint representation prejudiced her defense. She claimed that, in view of Ackerman's representation of Eaglin and the much stronger case against Eaglin,

she was prejudiced when Ackerman failed to advise her properly in determining not to waive a jury trial, not to testify, not to accept an offer of immunity; and linked her fate to Eaglin's in his closing argument to the jury.

The trial court's denial of the motion for new trial was affirmed by the Court of Appeals as follows:

> "The long established rule in this circuit is that to prevail on this ground, the defendant has the burden of establishing that the joint representation in fact created an actual conflict of interest and prejudiced her defense. See, e.g., United States v. Nystrom, 9 Cir., 1971, 447 F.2d 1350, 1351; Davidson v. Cupp, 9 Cir., 1971, 446 F.2d 642, 643. Kutas argues that we should reject this approach in favor of the District of Columbia's more 'liberal' rule. This suggestion was specifically rejected in Carlson v. Nelson, 9 Cir., 1971, 443 F.2d 21, 22, and we reject it again. * * *
>
> Given Kutas' burden of proof, we conclude that she has failed to show that she was actually prejudiced by any conflict."

REASONS FOR GRANTING THE WRIT

1. The Conflict of Standards in the Courts of Appeals

The right to the effective assistance of counsel for the defendant in a criminal trial is guaranteed by the Sixth Amendment to the United States Constitution. In Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), this Court first enunciated the standards for evaluating joint representation and for determining the existence of a conflict of interest which amounted to a denial of Sixth Amendment rights. Although widely regarded as the leading case in the area, Glasser simply provided a philosophical framework within which various courts have developed their own practical tests to determine the existence of a conflict of interest and/or specific prejudice stemming from joint representation. Clearly avoiding its chance to require a defendant to show both joint representation and actual prejudice

resulting therefrom, the Court in Glasser noted, "[t]he right to have assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 315 U.S. at 75-76.

Since 1942, Glasser has been cited extensively and its philosophy expanded in many decisions. The particular test to be used by a trial court in evaluating possible prejudice from joint representation was not elaborated by this Court in Glasser. As a result, each Circuit has articulated its own standards, and each case generally turns on its own facts. Whether a defendant requests retained counsel jointly with another defendant, or whether joint counsel is appointed, judicial concern about conflicts is the same. In one of the "Watergate" cases, four defendants sought to be represented by the same attorney, over objections by the government. In allowing the joint representation, Judge Sirica, none-

theless, noted his doubts:

> "Courts cannot simply assume that such arrangement is in accord with the desire of each defendant. Because one may accept dual or multiple representation without comprehending that his interests conflict with those of his co-defendants or without being aware of his right to demand individual representation, it is the Court's duty to satisfy itself that the choice is intelligently made and that conflicts are not likely." United States v. Liddy, 348 F.Supp. 198, 200 (D.D.C.1972).

The District of Columbia Circuit, by statute, automatically requires, at the outset, that separate counsel be appointed for co-defendants who are indigent. Criminal Justice Act, 18 U.S.C. § 3006A. Parallel to this statute is the requirement outlined by that Circuit's Court of Appeals in Campbell v. United States, 122 U.S. App. D.C. 143, 352 F.2d 359 (1965): Even when counsel is retained, the trial court has a responsibility to insure that a co-defendant's decision to proceed with the same attorney is an informed decision. 122

U.S. App. D.C. at 145.

In 1967 the District of Columbia Circuit adopted the "informed speculation" test. In companion cases, Lollar v. United States, 376 F.2d 243 (1967), and Ford v. United States, 379 F.2d 123 (1967), two convictions were reversed after a ruling that court-appointed counsel for the two defendants had involved error. The court in Lollar viewed the trial court record concerning possible prejudice in joint representation as only "the tip of the iceberg". The test, the court stated, is that a conviction may stand, in a joint representation case, only when there is no basis in the record for "an informed speculation" that the rights of the defendant are prejudicially affected. 376 F.2d at 247; Anderson v. United States, 122 U.S. App. D.C. 277, 279, 352 F.2d 945, 947 (1965). In Lollar, the quantum of proof required was that the government must show "beyond a reasonable doubt" that there was

no prejudice--the standard whenever the government contends that infringement of a constitutional right is harmless error. 376 F.2d 247, citing Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 18 L.Ed.2d 241 (1967); accord, Ford v. United States, 379 F.2d 123, 125 (1967).

In the First Circuit, as early as possible in a case, the trial judge is required to comment on the risks inherent in dual representation, if two defendants seek joint counsel. The judge must make the defendants aware of these risks and inquire diligently whether they have discussed the matter with counsel and whether they understand that they may have separate counsel, either retained or appointed. If the record does not indicate a satisfactory inquiry in these terms, the burden of persuasion shifts to the government, which must demonstrate that prejudice to the defendant, as a result of the joint representation, was "improbable". United States v.

Foster, 469 F.2d 1 (1st Cir.1972). Carrying the principle of "informed speculation" slightly further, the Third Circuit has established that, "upon a showing of a possible conflict of interest or prejudice, however remote, we will regard joint representation as constitutionally defective." United States Ex rel. Hart v. Davenport, 478 F.2d 203, 210 (1973) (emphasis added); Walker v. United States, 422 F.2d 374 (1970), cert. denied, 399 U.S. 915, 90 S.Ct. 2219, 26 L.Ed.2d 573.

Similarly, in the Fourth Circuit, a defendant is not required to show the precise way he was harmed in order to establish an impairment of his right to an unfettered assistance of counsel. Merely the possibility of harm is enough, when the salient fact in the case was that the co-defendants had divergent interests. Sawyer v. Brough, 358 F.2d 70 (4th Cir.1966).

In Butzman v. United States, 205 F.2d 343 (6th Cir.1953), the rule in the Sixth

Circuit became one of a presumption against waiver of the right to separate counsel and a concern with the fact that the right to effective representation is too fundamental to engage in discussions concerning degrees of prejudice.

The Seventh Circuit, as well, has affirmed that a defendant need not show actual prejudice but need only show that his/her representation with joint counsel "was not as effective as it might have been" with a separate lawyer. United States v. Gougis, 374 F.2d 758 (7th Cir.1967).

Despite the careful scrutiny given by these courts, not every Circuit regards joint representation with such skepticism. A clearly different standard has been set forth in the Second and Ninth Circuits. There, as shown by the opinion of the court below, some specific instance of prejudice, a real conflict of interest as a result of a joint representation, must be demonstrated before an

appellant can be successful in arguing that he has been denied the effective assistance of counsel. United States v. Lovano, 420 F.2d 769, 733 (2d Cir.1970), cert. denied, 397 U.S. 1071, 90 S.Ct. 1515, 25 L.Ed.2d 694; United States v. DeBerry, 487 F.2d 448 (2d Cir.1973); United States v. Nystrom, 447 F.2d 1350, 1351 (9th Cir.1971); Davidson v. Cupp, 446 F.2d 642, 643 (9th Cir.1971). Use of this standard, however, is by no means uniform or unquestioned, even by courts which have followed it for several years. The Eighth Circuit, for example, although accepting the requirement that an actual conflict of interest should be shown, also would allow evidence pointing to a "substantial possibility of a conflict" of interest between co-defendants, in order to show that joint representation constitutes a denial of the effective assistance of counsel. Austin v. Erickson, 477 F.2d 620, 623 (8th Cir.1973); United States v. Williams, 429 F.2d 158, 161 (8th Cir.1970), cert. denied, 400 U.S. 947,

91 S.Ct. 255, 27 L.Ed.2d 253.

The Second Circuit has also begun to acknowledge that the possibilities for prejudice inherent in dual representation cases must be more closely examined. In a concurring opinion in United States v. Mari, 526 F.2d 117, 120 (2d Cir.1975), Judge Oakes observed that:

> "The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations, when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation. [Citing ABA Standards Relating to the Prosecution Function and the Defense Function § 3.5 (Approved Draft 1971) at 211, 213.]"

The court below refused to depart from its "long established rule" that the defendant "has the burden of establishing that the joint representation in fact created an actual conflict of interest and prejudiced her defense." The court recognized that this rule was in

conflict with the more "liberal" rule in the District of Columbia. As previously shown, the court's decision also conflicts with every other Circuit (except the Second) which has considered the matter. Certiorari should be granted to resolve the conflict among the Circuits and to define the appropriate standard to be applied in multiple defendant cases.

2. The Conflict Among the Circuits on the Question of Waiver

There is also a conflict among the Circuits on the equally important question of whether a multiple defendant has knowingly waived his right to separate counsel.

This Court has held that the waiver of a constitutional right (here, the effective assistance of counsel) requires that there be an "intentional relinquishment or abandonment of a known right." Johnson v. Zerbst, 304 U.S. 458 (1938) (emphasis added). In the District Court and in the court below, the

affidavit signed by Kutas (see Statement, supra) was construed to be a knowing, intentional waiver of Kutas' right to separate counsel. The court below considered it important, on the question of waiver, that Kutas was "an intelligent and well educated woman holding a master's degree from the University of Oregon." Contrary to the holding of the court below, the District of Columbia Circuit has noted:

> "An individual defendant is rarely sophisticated enough to evaluate the potential conflict that can arise from joint representation, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks." Campbell v. United States, 122 U.S. 143, 352 F.2d 359, 360 (1965).

The District of Columbia Circuit requires "inquiry by the trial judge" as does the Fifth Circuit. In United States v. Garcia, 517 F.2d 272, 278 (5th Cir.1975), the Fifth Circuit has held that the voluntariness or knowledge

of the consequences of a waiver of the right to separate counsel should be judged by the same standard used to determine whether a defendant who pleads guilty does so voluntarily and with full knowledge of the consequences. As stated by the Fifth Circuit:

> "* * * [T]he district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections. Cf. United States v. Foster, 469 F.2d 1 (1st Cir.1972). It is, of course, vital that the waiver be established by 'clear, unequivocal, and unambiguous language.' National Equipment Rental v. Szukhert, 375 U.S. 311, 84 S.Ct. 411, 11 L.Ed.2d 354, 367-8

> (1964). Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver, but the court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection. Recordation of the waiver colloquy between defendant and judge will also serve the government's interest by assisting in shielding any potential conviction from collateral attack, either on Sixth Amendment grounds or on a Fifth or Fourteenth Amendment 'fundamental fairness' basis."

Both the District Court (Ct.309) and the Court of Appeals rejected the necessity of a detailed inquiry concerning waiver similar to that set forth in the Garcia case.[4]

There is a square conflict among the Circuits whether a detailed inquiry, similar to that used for determining whether a guilty plea is entered voluntarily, is necessary in the case of joint representation of multiple

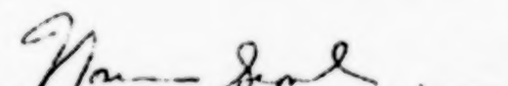
4. As shown in the above Statement (p. 6), United States Magistrate Hogan simply asked Kutas, without more, whether she had signed the affidavit and if any pressure or coercion was placed upon her to sign it.

defendants. The conflict should be resolved by this Court.

CONCLUSION

For the reasons stated, this writ should be granted and the judgment of the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EVA AGNES KUTAS, *Defendant-Appellant.*	No. 75-2756
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. EVA AGNES KUTAS, *Defendant-Appellant.*	Nc 75-3806

OPINION

[September 27, 1976]

Appeal from the United States District Court
for the District of Oregon

Before: KOELSCH, DUNIWAY and CHOY,
Circuit Judges

DUNIWAY, Circuit Judge:

Kutas appeals from a judgment of conviction of harboring and concealing, and of conspiracy to harbor and conceal, an escaped federal prisoner in violation of 18 U.S.C. §§ 1072 and 371. She also appeals from an order denying her motion for a new trial. We affirm in both appeals.

I. *The Sufficiency of the Evidence.*

We state the evidence in the light most favorable to the government, *Glasser v. United States*, 1942, 315 U.S. 60, 80. On May 17, 1974, Carl Bowles, a federal prisoner serving concurrent state and federal sentences at the Oregon State Penitentiary, left the

penitentiary under a four-hour pass and failed to return. Coconspirator Joan Coberly hid Bowles for approximately ten days, after which she and Bowles were driven to a house in Eugene, Oregon, where coconspirator Ray Eaglin was persuaded to help Bowles to escape. Kutas was present in the house at the time. Over the next hour or so Kutas and Eaglin loaded gear and supplies into a station wagon. Then Eaglin drove Bowles, Kutas and Coberly to a remote area of the Willamette National Forest where Bowles and Coberly set up camp in an underground bunker some distance into the forest. On the trip from Eugene to the campsite, Kutas prepared a list of things which Bowles would need for a long stay at the campsite. Throughout the trip, Eaglin carried a handgun visible in a side holster, at some point gave Bowles a gun, and, according to Coberly, told Bowles in Kutas' presence: "I don't think they are going to be looking for you, because everybody is looking for Hearst."

The evidence was sufficient to support a jury finding that Kutas knowingly harbored and concealed an escaped prisoner. Whether Kutas knew that Bowles was an escaped prisoner was for the jury; the knowledge could be inferred. Her claim that the evidence did not show that she harbored and concealed Bowles is also without merit. The evidence shows that she participated intimately in "transporting [Bowles and] furnishing him food, clothing, and a gun." *United States v. Hobson,* 9 Cir., 1975, 519 F.2d 765, 774.

II. *The Alleged Hearsay Statement.*

Kutas argues that Coberly's testimony that Eaglin told Bowles, in Kutas' presence, that the police weren't looking for him because they were looking for Hearst, was inadmissible and prejudicial hearsay. The government replies that the statement is admissible as a coconspirator's declaration. Neither argument is applicable here. Coberly's testimony was not hearsay. Federal Rules of Evidence, Rule 801(c), defines hearsay as "a statement . . . offered in evidence to prove the truth of the matter asserted." Coberly's testimony was not offered to prove the truth of Eaglin's statement. Whether the police were in fact looking for Bowles or Hearst was never an issue. The statement was admitted as evidence from which it could be inferred that Kutas knew that Bowles was an escapee. It was the fact that Eaglin made the

statement, not the truth of the statement, that was significant. *See United States v. Calaway,* 9 Cir., 1975, 524 F.2d 609, 613.

III. *The Jury Instruction.*

The court instructed the jury as follows:

> The words "harbor" and "conceal" refer to any physical act of providing assistance, including food, shelter, and other assistance to aid the prisoner in avoiding detection and apprehension.

In light of the interpretation given to "harbor and conceal" in *United States v. Hobson, supra,* 519 F.2d at 773-74, the instruction was correct.

IV. *Effective Assistance of Counsel.*

In support of her motion for a new trial, Kutas argues that she was denied effective assistance of counsel because Ackerman, her attorney, also represented Eaglin at the joint trial, and his duty to Eaglin conflicted with his duty to Kutas, to her prejudice.

Evidence received at the hearing of the motion for a new trial disclosed the following: Kutas was originally represented by a court-appointed attorney, but she quickly became dissatisfied with him. She therefore dismissed him and approached Ackerman, Eaglin's appointed counsel, asking him to represent her also. He was representing, on retainer, a codefendant, Maltzman, and agreed to act for Kutas. Ackerman explained to her that conflict of interest problems often arise in joint representation cases, and he gave her a number of specific examples. This conversation was later confirmed in a letter from Ackerman to Kutas. Ackerman also discussed the matter with the magistrate assigned to Kutas' case.

The magistrate, although he had been assured by Ackerman that investigation for the defense was almost completed without revealing any trace of a conflict, did not allow Ackerman to represent the defendants jointly until each defendant had signed an affidavit agreeing to joint representation. The affidavit stated that each defendant knew about possible conflicts, had discussed the matter thoroughly with Ackerman, realized that each had a

right to separate counsel, and that each saw no factual or legal issues which would give rise to any conflict. The affidavit also stated that each defendant recognized a continuing duty to disclose any conflict the minute it arose, and that each knew that Ackerman could only represent one of them if that happened. During the trial, no defendant expressed any concern about the joint representation, nor did Ackerman, and Ackerman frequently reassured the court that no conflicts existed.

After her conviction and sentencing, Kutas' family retained yet another attorney for her, and shortly thereafter this attorney filed a motion for a new trial based on the ground that Ackerman's joint representation prejudiced Kutas' defense. She claims now that, because Ackerman also represented Eaglin, he failed to seek a severance of the trials, failed to inform her of her right to separate counsel and influenced her improperly in advising her not to waive a jury trial, not to testify, and not to accept an offer of immunity.

The long established rule in this circuit is that to prevail on this ground, the defendant has the burden of establishing that the joint representation in fact created an actual conflict of interest and prejudiced her defense. *See, e.g., United States v. Nystrom*, 9 Cir., 1971, 447 F.2d 1350, 1351; *Davidson v. Cupp*, 9 Cir., 1971, 446 F.2d 642, 643. Kutas argues that we should reject this approach in favor of the District of Columbia Circuit's more "liberal" rule. This suggestion was specifically rejected in *Carlson v. Nelson*, 9 Cir., 1971, 443 F.2d 21, 22, and we reject it again. We think that, especially in a case like this, where, despite the hesitation of counsel and the court, the defendant insists on joint representation, makes no objection throughout the trial, and after conviction seeks a new trial, the burden should be on the defendant to show that a conflict actually existed and that it actually prejudiced her rights. Any other rule would allow defendants to plant almost certain error in the record.

Given Kutas' burden of proof, we conclude that she has failed to show that she was actually prejudiced by any conflict. Kutas was aware of her right to separate counsel, and she had no desire to seek a severance. The testimony of both Ackerman and the attorney representing another co-defendant is that Kutas

agreed with, and was very pleased with, the decision not to have any defendant testify. We do not accept the after-the-fact claim, which the trial court rejected, that the strategy designed to avoid cross-examination was motivated by a conflict of interest. *See United States v. Wisniewski*, 2 Cir., 1973, 478 F.2d 274, 284. Likewise, we will not reverse the denial of a motion for a new trial based on the fact that the defendants initially disagreed on whether to waive a jury trial when they later agreed without any claim of conflict of interest. *See Kaplan v. United States*, 9 Cir., 1967, 375 F.2d 895, 898. Finally, the record shows that Kutas' refusal to accept immunity arose out of her feelings of comradeship and solidarity with the other defendants, and not because of any conflict of interest that her counsel may have had. In fact, Ackerman advised her to weigh the offer carefully. In sum, Kutas has been unable to demonstrate that her defense was in any way prejudiced by Ackerman's joint representation.

Additionally, even were Kutas able to point to some prejudice, nevertheless her affidavit satisfies the burden of demonstrating that she knowingly and voluntarily waived her right to separate counsel. Kutas is an intelligent and well educated woman holding a master's degree from the University of Oregon. It is inconceivable that, after Ackerman's many discussions with her on the subject, she was not aware of her rights or of the potential problems involved in having joint counsel. She validly waived her right to separate counsel, as the trial judge found. *See United States v. Frame*, 9 Cir., 1972, 454 F.2d 1136, 1138.

The judgment and the order appealed from are affirmed.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO 10-5-76—400

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Petition for a Writ of Certiorari on the following attorneys for the United States on October 21, 1976, by mailing to said attorneys correct copies thereof, certified by me as such, contained in sealed envelopes addressed to said attorneys at their regular office addresses, to-wit:

Hon. Robert H. Bork
Solicitor General of the
United States
Department of Justice
Washington, D. C. 20530

Kristine O. Rogers
Asst. U. S. Attorney
P. O. Box 71
Portland, Oregon 97207

and deposited in the post office at Portland, Oregon, on said date.

DATED: October 21, 1976.

Norman Sepenuk
Attorney for Petitioner